No. 23A486

In the Supreme Court of the United States

NATIONAL ASSOCIATION FOR GUN RIGHTS; ROBERT C. BEVIS; and LAW WEAPONS, INC., d/b/a LAW WEAPONS & SUPPLY, an Illinois corporation,
Plaintiffs-Applicants,

v.

CITY OF NAPERVILLE, ILLINOIS, and JASON ARRES,
Defendants-Respondents,

and

THE STATE OF ILLINOIS
Intervenor-Respondent.

To The Honorable Amy Coney Barrett, Associate Justice of the United States Supreme Court and Circuit Justice for the Seventh Circuit

RESPONSE IN OPPOSITION TO RENEWED APPLICATION FOR INJUNCTION PENDING REVIEW

CHRISTOPHER B. WILSON*
KATHLEEN A. STETSKO
DANIEL T. BURLEY
KAHIN GABRIEL TONG
PERKINS COIE LLP
110 N. Wacker, Suite 3400
Chicago, Illinois 60606
(312) 324-8400
CWilson@perkinscoie.com

DOUGLAS N. LETTER
SHIRA LAUREN FELDMAN
BRADY CENTER TO
PREVENT GUN VIOLENCE
840 First Street NE, Suite 400
Washington, DC 20002
(202) 370-8100

Attorneys for the Naperville Parties

KWAME RAOUL
Illinois Attorney General
JANE ELINOR NOTZ*
Solicitor General
SARAH A. HUNGER
Deputy Solicitor General
JOHN R. MILLIGAN
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
Jane.Notz@ilag.gov

Attorneys for the State of Illinois

*Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

For the second time this year, and again without attempting to satisfy the requirements for the extraordinary relief sought, applicants ask this Court to enjoin two laws—a state statute and local ordinance—pending further review in the United States Court of Appeals for the Seventh Circuit and any subsequent petition for writ of certiorari. Applicants' request, which was not made by any other plaintiff in the six cases consolidated below, should be denied for essentially the same reasons that the Court denied their application in May.

Applicants have not attempted to make, and cannot make, the necessary showing that this Court is likely to grant certiorari in this interlocutory appeal. As applicants concede, Appl. 28-29, there is no split in authority as to any question presented by this case.[1] On the contrary, the Seventh Circuit is the only federal circuit court or state court of last resort to have addressed the validity of restrictions on assault weapons and large capacity ammunition feeding devices ("LCMs") following *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). And as of this filing, there are at least eight cases pending in the federal circuit courts involving challenges to such restrictions, with many others pending in federal district and state courts across the country. Given the lack of division in authority as to the constitutionality of these restrictions, and the certainty that other courts of appeals will reach their own conclusions regarding

---

[1] The application is cited as "Appl.__" and its appendix as "Appx. ___." Citations to the district court docket are identified by the docket number and page number, *e.g.*, "Doc. __ at __." The Seventh Circuit docket is cited as "7th Cir. Doc. __ at __."

the questions presented here, granting an injunction at this stage—with certiorari unwarranted under this Court's Rule 10—would be both premature and prejudicial. See *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of injunctive relief) (emergency docket should not be used "to force the Court to give a merits preview" where certiorari is not warranted). That is especially true given the Seventh Circuit's emphasis on the interlocutory nature of its opinion, which, in the court's own words, provides "just a preliminary look at the subject." Appx. 163.

Beyond that, applicants have not shown that it is indisputably clear that they will prevail on their claim that the statute and ordinance violate the Second Amendment. Nor could they: this Court has not addressed a Second Amendment challenge to a similar law. And, after applying *Bruen*'s two-step framework, the vast majority of lower courts have declined to enjoin similar laws. It thus is not indisputable that applicants will succeed on the merits of their claim.

Applicants also have failed to show the existence of circumstances warranting this Court's immediate intervention. Instead, they rely on the same evidence—an affidavit signed in February 2023—that they presented in their prior application, which this Court denied in May. And applicants delayed filing their current injunction request, belying their argument that they face exigent circumstances. Furthermore, applicants rely on a presumption of harm that this Court has never applied outside of First Amendment cases, again demonstrating that their right to relief is not indisputably clear. Otherwise, they rely on

inapposite court of appeals precedent and the alleged financial losses of a single gun store, neither of which shows that they will incur irreparable harm absent an injunction.

STATEMENT OF THE CASE

A. Regulatory background.

On July 4, 2022, a shooter armed with a semiautomatic AR-15 rifle and 30-round magazines opened fire on an Independence Day parade in Highland Park, Illinois.[2] This weapon made it possible for the shooter to fire 83 rounds in less than a minute, killing 7 and wounding 48.[3] A Highland Park ordinance prohibited the sale of assault weapons, but the shooter had legally purchased the murder weapon elsewhere in Illinois.[4]

One month later, Naperville passed an ordinance prohibiting the commercial sale of assault rifles within city limits. Appx. 54-64. The definition of "assault rifle"—which identifies weapons both by features and by make and model—mirrors the definition of "semiautomatic assault weapon" in the federal assault weapons ban that was in effect from 1994 until it expired under its sunset provision in 2004. Appx. 59-62; Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, tit. XI, subtit. A, 108 Stat. 1796, 1996-2010 (1994).

---

[2] Victoria Kim & Amanda Holpuch, What We Know About The Shooting In Highland Park, N.Y. Times (July 7, 2022), http://bit.ly/3ytxFZv.

[3] Peter Hancock, Lawmakers Hear from Advocates for Assault Weapon Ban, Capitol News Illinois (Dec. 12, 2022), http://bit.ly/3Jw80WG; Shia Kapos, Illinois House Passes Assault Gun Bill, Politico (Jan. 6, 2023), http://bit.ly/3YwxU0E.

[4] Kim & Holpuch, *supra* note 2.

On January 10, 2023, the State of Illinois passed the Protect Illinois Communities Act, Illinois Public Act 102-1116 ("Act"), which restricts the sale, purchase, manufacture, delivery, importation, and possession of assault weapons and LCMs. 720 ILCS 5/24-1.9, 1.10. The Act adopts a two-fold definition of "assault weapon" that is similar to Naperville's ordinance—it identifies specific weapons by name (*e.g.*, AR-15 and AK-47 rifles) and lists features that, individually or in combination, make specific firearms assault weapons (*e.g.*, flash suppressors, barrel shrouds, or grenade launchers). *Id.* 24-1.9(a)(1)(A)-(L). LCMs are defined as a magazine or similar device that can accept more than 10 rounds of ammunition for long guns or more than 15 rounds for handguns. *Id.* 24-1.10(a)(1).

The Act includes various exceptions. It excludes from the definition of assault weapons all antique firearms, air rifles, handguns (unless they have the features prohibited by the Act), and firearms operated by bolt, pump, lever, or slide action. *Id.* 5/24-1.9(a)(2). The Act's restrictions do not apply to law enforcement, members of the military, and other professionals with similar firearms training and experience. *Id.* 5/24-1.9, 1.10. And individuals who lawfully possessed assault weapons and LCMs prior to the Act may continue to do so. *Id.* 5/1.9(c)-(d) & 5/1.10(c)-(d). To continue lawfully possessing an assault weapon, an individual must submit to the State Police an endorsement affidavit by January 1, 2024. *Id.* 5/24-1.9(d). This requirement does not extend to LCMs. *Id.* 5/24-1.10(d).

B. Applicants file suit and seek preliminary injunctive relief.

In 2022, applicants—an advocacy group, a gun store, and the store's owner—filed a complaint against Naperville, claiming that its ordinance violated the Second Amendment, Doc. 1 at 1-3, and moved for a preliminary injunction, Appx. 34-53. Naperville responded, relying on six expert declarations. Docs. 12, 34, 34-1. Applicants later amended their complaint to add a claim that the Act violated the Second Amendment and renewed their motion for a preliminary injunction. Appx. at 65, 70-71; Doc. 50. They named no state officials as defendants, but named the Naperville Police Chief on the theory that he was responsible for enforcing the Act against them. Appx. 65, 67.

In response, Naperville argued, among other things, that applicants were unlikely to succeed on the merits because the Act was constitutional under *Bruen*'s text-and-history test. Doc. 57 at 9-14. In support, Naperville attached eight additional expert declarations. Those declarations demonstrated that from the Colonial Era onward, States have regulated weapons that were thought to be especially dangerous and unusual—from knives, clubs, pistols, and revolvers in the 18th and 19th centuries to automatic and semiautomatic firearms in the early 20th century. Doc. 57-8; Doc. 57-10; Doc. 57-11. In particular, Naperville offered evidence that there is a longstanding and regular course of practice in this country whereby a weapon is introduced into civilian society, proliferates to the point where its use becomes a significant threat to public safety, and is then regulated by the government to curb violence and protect the public. *E.g.*, Doc. 57-10 ¶ 8.

The declarations also described the unique danger and lethality of assault weapons and LCMs, Doc. 57-4 ¶¶ 25-57; Doc. 57-6 ¶¶ 12-35; Doc. 57-9 ¶¶ 19-30, and explained that assault weapons were developed and marketed as military-style offensive weapons rather than as a means for lawful self-defense, Doc. 57-5 ¶¶ 24-42; Doc. 57-11 ¶¶ 56-58. In fact, assault weapons and LCMs are not as effective or suitable for self-defense as handguns and shotguns, Doc. 57-4 ¶¶ 58-61; Doc. 57-6 ¶ 30, and are very rarely used for those purposes, Doc. 57-4 ¶ 36; Doc. 57-7 ¶¶ 27-29. On the contrary, they are increasingly used in crimes of violence, including mass shootings. Doc. 57-4 ¶¶ 41-57; Doc. 57-7 ¶¶ 10-22; Doc. 57-8 ¶¶ 54-61.

C. Applicants' motion for preliminary injunctive relief and follow-on motions for injunction pending appeal are denied.

On February 17, the district court denied applicants' motion for preliminary injunctive relief. Appx. 1-33. First, the court determined that "Naperville's Ordinance and the . . . Act are consistent with the Second Amendment's text, history, and tradition." Appx. 5. As the court explained, "the text of the Second Amendment is limited to only certain arms, and history and tradition demonstrate that particularly 'dangerous' weapons are unprotected." Appx. 18. "Because assault weapons are particularly dangerous weapons and high-capacity magazines are particularly dangerous weapon accessories, their regulation accords with history and tradition." Appx. 30. Second, applicants had not demonstrated that they would suffer irreparable harm because the gun store could "still sell almost any other type of gun" and the advocacy group's members could acquire "other effective weapons

for self-defense." Appx. 32. Finally, as to the balancing of equities, the court found that the Act and the ordinance would protect public safety. Appx. 33.

Applicants appealed, Doc. 64, and the State intervened to defend the constitutionality of the Act, Docs. 68, 70; Appx. 77. Applicants then filed a motion for an injunction pending appeal, Appx. 78-103, which the district court denied, Doc. 73. After the Seventh Circuit denied applicants' renewed motion for an injunction pending appeal, Appx. 104-122; 7th Cir. Doc. 51, applicants submitted their first emergency application to this Court, which it denied on May 17, see Order, *Nat'l Ass'n for Gun Rights v. Naperville*, No. 22A948 (U.S. May 17, 2023).

D. The Seventh Circuit affirmed the district court's denial of preliminary injunctive relief.

After the district court denied preliminary injunctive relief, two other district courts within Illinois issued decisions in five cases raising challenges to the Act and, in one case, to local ordinances with similar restrictions. Appx. 136-142. The parties in those cases appealed, and the Seventh Circuit consolidated the six cases for purposes of oral argument and decision. 7th Cir. Doc. 91.

On November 3, the Seventh Circuit issued a 2-1 decision that, as relevant here, affirmed the district court's denial of preliminary relief. Appx. 129-175. The Seventh Circuit concluded that applicants were not likely to succeed on the merits of their claim under the two-part standard set forth in *Bruen*, which considers whether the regulated conduct is covered by the text of the Second Amendment and, if so, whether the regulation is consistent with this nation's historical tradition of regulating firearms. Appx. 132. The court also noted that this result, as well as the

underlying methodology, was "basically compatible" with its decision in *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), which upheld similar restrictions on assault weapons and LCMs by looking to history and tradition (as opposed to employing means-ends scrutiny). Appx. 147.

At *Bruen*'s first step, the Seventh Circuit looked to "the 'plain text' of the Second Amendment to see whether the assault weapons and [LCMs] . . . fall within the scope of the 'Arms' that individual persons are entitled to keep and bear." Appx. 153. The court explained that "[b]oth Supreme Court decisions and historical sources indicate that the Arms the Second Amendment is talking about are weapons in common use for self-defense," *ibid.*, and "[n]ot machineguns . . . , because they can be dedicated exclusively to military use," Appx. 154. Accordingly, applicants bore "the burden of showing that the weapons addressed in the [Act] are Arms that ordinary people would keep at home for purposes of self-defense, not weapons that are exclusively or predominantly useful in military service, or weapons that are not possessed for lawful purposes." Appx. 156.

Based on the record compiled thus far, the Seventh Circuit continued, applicants had not satisfied this burden because "assault weapons and [LCMs] are much more like machineguns and military-grade weaponry than they are like the many different types of firearms that are used for individual self-defense." Appx. 159. In particular, the court noted, "we are not persuaded that the AR-15 is materially different from the M16," which as "*Heller* informs us[, . . .] is not protected by the Second Amendment, and therefore may be regulated or banned."

Appx. 163. The court made clear, however, that this was only "a preliminary look at the subject" based on the record amassed in "the early phases of litigation." *Ibid.* It therefore did not "rule out the possibility" that applicants could present evidence "that shows a sharper distinction between AR-15s and M16s." *Ibid.*

The court then turned to the second step of the *Bruen* analysis and concluded, as an alternative ground for affirmance, that applicants had not shown a likelihood of success on the current record. At this step, the court explained, respondents bear the burden of showing that the restrictions are "consistent with the history and tradition of firearms regulation," which includes an assessment of "whether the regulated weapons are 'in common use.'" Appx. 164. This inquiry, however, cannot be based "on numbers alone," as applicants had argued, and must instead be anchored in history and tradition. Appx. 165. Otherwise, the analysis would have "anomalous consequences," as "seen in the case of the AR-15." Appx. 166. In 1994, the federal assault weapons ban "made civilian possession of AR-15s (among other assault weapons) unlawful," and "few civilians owned AR-15s." *Ibid.* But after the legislation expired, "these weapons began to occupy a more significant share of the market." *Ibid.* If common use were tied solely to numbers, "the federal ban would have been constitutional before 2004, but unconstitutional thereafter." *Ibid.*

Thus, the Seventh Circuit explained, it would not base its assessment on mere numbers; instead, at *Bruen*'s second step, the government may show that a regulation is constitutional by showing it is part of the "enduring American tradition of state regulation," based on the "answers to two questions: (1) how, and

(2) why, does [the] regulation burden a law-abiding citizen's right to armed self-defense?" Appx. 167 (internal quotations omitted). Here, the court continued, respondents had satisfied this burden by pointing to historical regulations that both imposed comparable burdens on the Second Amendment right as the Act and ordinance, and that were enacted to "advance similar purposes" as these present-day laws. *Ibid.* For example, the court found that there is a "long-standing tradition of regulating the especially dangerous weapons of the time, whether they were firearms, explosives, Bowie knives, or other like devices," in order to protect the health, safety, and welfare of the community. *Ibid.* Beyond these considerations, the court found that "the distinction between military and civilian weaponry [is] useful for *Bruen*'s second step, too," noting the "long" history of States and the federal government allowing for "the military and law enforcement [to] have access to especially dangerous weapons," while restricting "civilian ownership of those weapons." Appx. 170; see also Appx. 171-173 (listing examples of comparable historical regulations).

Plaintiffs in each of the consolidated cases filed petitions for rehearing en banc, which remain pending. 7th Cir. Docs. 175, 179, 185, 190. On November 21, nearly three weeks after the panel issued its decision, applicants filed a motion with the Seventh Circuit seeking an injunction pending review of their en banc petition and any follow-on petition for writ of certiorari. 7th Cir. Doc. 187. The Seventh Circuit denied the motion. 7th Cir. Doc. 189. No other plaintiff has sought such an injunction in either the Seventh Circuit or this Court.

ARGUMENT

The application for an injunction should be denied. Although applicants cite Rule 23—which sets forth the procedures for seeking a stay of a lower court's judgment—they are not requesting such relief from this Court. Rather, what they seek is more significant: an affirmative injunction pending review of their en banc petition and any certiorari petition. These requests are not the same. *Nken v. Holder*, 556 U.S. 418, 428 (2009). Unlike a stay, an injunction disturbs the status quo and "grants judicial intervention that has been withheld by lower courts." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (cleaned up). Granting such relief thus "demands a significantly higher justification" than a stay. *Ohio Citizens for Reasonable Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). But applicants cannot even satisfy the lower standard for a stay, which requires showing a "significant possibility" that certiorari would be granted and that the Court would reverse the Seventh Circuit's decision. *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987).

In addition to satisfying the requirements for a stay, to obtain an injunction pending further review applicants must also "demonstrate that the legal rights at issue are indisputably clear," *Lux*, 561 U.S. at 1307 (cleaned up), and that "the most critical and exigent circumstances" exist, *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers) (cleaned up). Finally, as with any request for an injunction, applicants must make a "strong showing" that they are likely to prevail on the merits, that they will suffer irreparable harm absent an injunction,

and that an injunction would not harm the public interest. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (cleaned up).

Applicants have not met this heightened standard for several reasons. First, they have ignored the issue of whether the Court will grant interlocutory review in this case (which is unlikely). Second, applicants have not shown that they have an indisputably clear right to relief because this Court has not addressed the constitutionality of a law similar to the Act or the ordinance, and it is not indisputably clear that they will prevail under *Bruen*'s two-step test for Second Amendment challenges. And third, applicants have not shown that critical or exigent circumstances exist. In fact, they delayed seeking emergency relief, they have not shown that they will suffer irreparable harm absent an injunction, and any alleged harm is outweighed by the public interest in keeping the Act and ordinance in effect.

I. Applicants Have Not Shown That This Court Is Likely To Grant Certiorari.

Applicants have not shown, as they must, that the Court is likely to grant certiorari to review the Seventh Circuit's decision. In fact, the Court is unlikely to grant review because there is no circuit split on any question presented, further percolation is warranted (and is occurring), and the Court generally declines to review interlocutory appeals.

1. As applicants concede, Appl. 28-29, there is no conflict among the United States Courts of Appeals or the state courts of last resort as to the questions presented in the application, making certiorari unwarranted under this Court's

Rule 10. To our knowledge, at least eight cases are pending before the federal courts of appeals (not to mention other cases pending before federal district courts and state courts) challenging restrictions similar to the Act and ordinance. See *Miller v. Bonta*, No. 23-2979, Doc. 13-1 (9th Cir. Oct. 28, 2023); *Duncan v. Bonta*, No. 23-55805 (9th Cir. Sept. 25, 2023); *Grant v. Lamont*, No. 23-1344 (2d Cir. Sept. 28, 2023); *Nat'l Ass'n of Gun Rights v. Lamont*, No. 23-1162 (2d Cir. Aug. 16, 2023); *Fitz v. Rosenblum*, Nos. 23-35478, 23-35479, 23-35539, 23-35540 (9th Cir. Aug. 15, 2023); *Hanson v. Dist. of Columbia*, No. 23-7061 (D.C. Cir. May 17, 2023); *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, No. 23-1633 (3d Cir. Apr. 7, 2023); *Ocean State Tactical, LLC v. Rhode Island*, No. 23-01072 (1st Cir. Jan. 23, 2023).[5] The decision below is, at this stage, the only opinion issued by any court of appeals resolving claims of this nature. The case thus plainly does not warrant certiorari under Rule 10. See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam) (describing the Court's "ordinary practice of denying [certiorari] petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals"). Accordingly, applicants cannot show, as they must to obtain an injunction pending appeal, that the Court is likely to grant review. *Am. Trucking Ass'ns*, 483 U.S. at 1308.

Indeed, those courts that *have* considered claims like applicants' have largely rejected them, consistent with the Seventh Circuit's opinion. See *Brumback v.*

---

[5] In addition to these post-*Bruen* decisions, there is a pending appeal from a pre-*Bruen* decision involving a challenge to Maryland's restrictions on assault weapons. See *Bianchi v. Frosh*, No. 21-1255 (4th Cir. Mar. 9, 2021).

Ferguson, No. 1:22-cv-03093, 2023 WL 6221425 (E.D. Wash. Sept. 25, 2023); *Grant v. Lamont*, No. 3:22-cv-01223, 2023 WL 5533522 (D. Conn. Aug. 28, 2023); *Nat'l Ass'n of Gun Rights v. Lamont*, No. 22-cv-01118, 2023 WL 4975979 (D. Conn. Aug. 3, 2023); *Or. Firearms Fed'n v. Kotek*, Nos. 2:22-cv-01815, 3:22-cv-01859, 3:22-cv-01862, 3:22-cv-01869, 2023 WL 4541027 (D. Or. July 14, 2023); *Hartford v. Ferguson*, No. 3:23-cv-05364, 2023 WL 3836230 (W.D. Wash. June 6, 2023); *Hanson v. Dist. of Columbia*, No. 22-cv-2256, 2023 WL 3019777 (D.D.C. Apr. 20, 2023); *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, No. 22-cv-951, 2023 WL 2655150 (D. Del. Mar. 27, 2023); *Ocean State Tactical, LLC v. Rhode Island*, 646 F.Supp.3d 368 (D.R.I. 2022); *Or. Firearms Fed'n, Inc. v. Brown*, 644 F. Supp. 3d 782 (D. Or. 2022).[6] And to our knowledge, no court of appeals—despite the many lawsuits challenging laws similar to the Act and the ordinance—has granted emergency relief in such a case. Nor has any plaintiff in any of these cases (except for applicants) sought emergency relief from this Court.

---

[6] Two district courts in the Ninth Circuit have found similar legislation to be unconstitutional, but the court of appeals stayed both rulings pending its review. *Miller v. Bonta*, No. 23-2979, Doc. 13-1 (9th Cir. Oct. 28, 2023); *Duncan v. Bonta*, 83 F.4th 803 (9th Cir. 2023). Additionally, two district courts in the Tenth Circuit granted temporary restraining orders in cases challenging local restrictions on assault weapons, but the cases were voluntarily dismissed before the defendants could appeal. See *Rocky Mountain Gun Owners v. Bd. of Cty. Comm'rs of Boulder Cty.*, No. 22-cv-2113, Doc. No. 15 (D. Colo. Aug. 30, 2022) (case voluntarily dismissed after issuance of temporary restraining order, Doc. No. 30); *Rocky Mountain Gun Owners v. Superior*, No. 1:22-cv-1685, Doc. No. 18 (D. Colo. July 22, 2022) (case voluntarily dismissed, Doc. 52, temporary restraining order dissolved, Doc. No. 53).

2. The interlocutory posture of this case is an additional reason why the Court is unlikely to grant certiorari. As detailed *infra* Section II, this case presents complex legal issues requiring developed evidentiary and historical records. Indeed, the Seventh Circuit recognized below that its decision "is just a preliminary look at the subject," with "Second Amendment challenges to gun regulations often requir[ing] more evidence than is presented in the early phases of litigation." Appx. 163. The court thus did not "rule out the possibility" that additional evidence presented in later phases of litigation could affect its ultimate determination. *Ibid.*

This Court, therefore, would benefit from further development of the parties' evidence and the lower courts' review of that evidence. In fact, the Court usually denies review when a case is in an interlocutory posture—even when it presents a significant constitutional question. *E.g.*, *Abbott v. Veasey*, 580 U.S. 1104, 1104-1105 (2017) (Roberts, C.J., statement respecting denial of certiorari); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 945 (2012) (Alito, J., statement respecting denial of certiorari); *Wrotten v. New York*, 560 U.S. 959, 960 (2010) (Sotomayor, J., statement respecting denial of certiorari); *Va. Mil. Inst. v. United States*, 113 S. Ct. 2431, 2431-2432 (1993) (Scalia, J., statement respecting denial of certiorari). That this is an interlocutory appeal is thus another reason why this Court is unlikely to grant certiorari, making applicants' request for an injunction unwarranted.

As noted, applicants do not address these issues. See Appl. 6-27. Instead, they principally argue that the Seventh Circuit erred in affirming the district court's denial of a preliminary injunction, see *id.* at 11-27, but this Court is not a

court of error correction, see Sup. Ct. R. 10. On this basis alone, therefore, the application should be denied. But as discussed below, applicants also have not established the remaining requirements for emergency injunctive relief.

II. Applicants Have Not Shown That They Are Indisputably Entitled To Relief.

Applicants have not shown that it is indisputably clear that they would prevail on review to this Court. This Court has not addressed the validity of laws that restrict the manufacture, sale, or possession of assault weapons or LCMs. See *Bruen*, 142 S. Ct. at 2157 ("Nor does [*Bruen*] decide anything about the kinds of weapons people may possess.") (Alito, J., concurring); see also *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (right to relief not indisputably clear where Court had not previously addressed issues raised in application). And as applicants concede, Appl. 28-29, the vast majority of lower courts to address Second Amendment challenges to such laws have denied relief to the challengers, and no circuit court or state court of last resort has issued a decision conflicting with the Seventh Circuit's decision in this case.

Nor have applicants shown that it is indisputably clear that they will prevail under *Bruen*'s two-step test. At the first step, applicants bear the burden of showing that assault weapons and LCMs are "arms" in "common use today for self-defense." *Bruen*, 142 S. Ct. at 2132, 2134 (cleaned up). If they satisfy that burden, then at the second step, the government "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126. At either step, applicants' right to relief is not indisputably clear.

A. It is not indisputably clear that the Act and ordinance regulate conduct protected by the Second Amendment.

To satisfy their burden at step one, applicants must prove that the regulated items fit within the category of "arms" that are presumptively protected by the Second Amendment. *Bruen*, 142 S. Ct. at 2132. Applicants do not meaningfully attempt to meet this standard. Instead, they make the conclusory assertion that "the banned firearms are obviously 'arms' covered by the plain text" because under *District of Columbia v. Heller*, 554 U.S. 570 (2008), "all firearms constitute arms." Appl. 8 (cleaned up). Applicants misread *Heller*. As this Court recognized in *Heller* and reiterated in *Bruen*, the Second Amendment right "'is not unlimited.'" *Bruen*, 142 S. Ct. 2132 at 2128 (quoting *Heller*, 554 U.S. at 626), and "extends only to certain types of weapons," *Heller*, 554 U.S. at 623; see also *id.* at 626 (no "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"). Namely, the Court held that the Amendment protects firearms "in common use today for self-defense." *Id.* at 2132, 2134 (internal quotations omitted); *McDonald v. City of Chicago*, 561 U.S. 742, 749-750 (2010) ("[T]he Second Amendment protects the right to keep and bear arms for the purpose of self-defense."); *Heller*, 554 U.S. at 628 ("the inherent right of self-defense" is "central to the Second Amendment"). Because applicants make no attempt to satisfy this standard, they cannot show that they will indisputably prevail at step one. But

even if they had, there are at least three reasons why it is not indisputable that applicants will satisfy this burden.

1. First, applicants have not shown that it is indisputably clear that the Second Amendment protects offensive weapons of war like assault weapons and LCMs. As the Seventh Circuit explained, while the plain text of the Amendment covers "Arms that ordinary people would keep at home for purposes of self-defense," it does not protect "weapons that are exclusively or predominantly useful in military service." Appx. 156; see also, *e.g.*, *Bruen*, 142 S. Ct. at 2134 (handguns protected because they are "in common use today for self-defense") (cleaned up); *Heller*, 554 U.S. at 627 ("weapons that are most useful in military service—M-16 rifles and the like—may be banned"). And here, as the court concluded based on the record before it, assault weapons and LCMs "are much more like machineguns and military-grade weaponry than they are like the many different types of firearms that are used for individual self-defense." Appx. 159.

In particular, respondents presented substantial evidence that assault weapons and LCMs are designed for offensive, militaristic use rather than self-defense. This included evidence that these instruments derive from rifles and magazines designed for modern militaries with features that "increase the effectiveness of killing enemy combatants in offensive battlefield situations." Doc. 57-5 ¶ 25; see also 7th Cir. Doc. 15 at A596 ("The lineage of high capacity detachable magazines can be traced directly to a military heritage."). By way of example, the AR-15 models in circulation today trace their origin to rifles designed

in the 1950s for use by the American military. Doc. 57-4 ¶ 25; 7th Cir. Doc. 37-9 at A585-587. Following field tests in Vietnam in the early 1960s, the Army adopted the AR-15 as a combat rifle, rechristening it the M-16. Doc. 57-4 ¶¶ 26-32.

Based on this evidence, the Seventh Circuit found that "the AR-15 is almost the same gun as the M16 machinegun," Appx. 159, which this Court has deemed permissible to ban, *Heller*, 554 U.S. at 627. The only difference between the two is that M-16s have the ability to toggle between semiautomatic and automatic fire, Doc. 57-11 ¶ 55 ("The military M-16 and the civilian AR-15 are closely related."); 7th Cir. Doc. 15 at A604 (civilian AR-type rifles "retain the identical performance capabilities and characteristics (save full automatic capability) as initially intended for use in combat"). Furthermore, AR-15s are as effective on the battlefield (if not more so) as automatic weapons like the M-16. Doc. 57-4 ¶ 33 (Army's 2008 Field Manual stressed that semiautomatic fire is "the most important firing technique during fast-moving modern combat" in part because it is "devastatingly accurate") (cleaned up); Doc. 57-5 ¶ 26 (semiautomatic is "the mode that is most often deployed in battle to efficiently target and kill enemy troops" and is viewed by Special Forces trainers as "the preferred and most lethal setting in most wartime scenarios").

In addition, while the evidence showed that assault weapons and LCMs are effective in combat settings, it also showed that they are unsuitable for personal self-defense. Assault weapons enable high-velocity rounds to be fired at "a high rate of delivery" and "a high degree of accuracy at long range." Doc. 57-6 ¶ 14 & n.5; Doc. 57-4 ¶ 39. Accordingly, assault weapons cause "more victims and injuries per

event." Doc. 57-9 ¶ 25. LCMs "increase this destructive potential by increasing the number of rounds someone can fire without having to reload." Doc. 57-6 ¶ 30; Doc. 57-4 ¶ 41 (discussing shooters' ability "to fire rapidly with high-capacity magazines and remain accurate at ranges well beyond 100 yards"). While these features are potent on the battlefield, they are unnecessary for civilian self-defense, which is primarily conducted at close range. Doc. 54-4 ¶ 59; 7th Cir. Doc. 15 at A598. Similarly, self-defense does not typically require the round capacity of LCMs. 7th Cir. Doc. 15 at A600 ("abundance of ammunition" is no substitute for "weapons familiarization and shot placement"). As studies examining "armed citizen" incidents have confirmed, "the average number of shots fired in self-defense was 2.2 and 2.1, respectively." *Kolbe v. Hogan*, 849 F.3d 114, 127 (4th Cir. 2017) (en banc), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111; *Hanson*, 2023 WL 3019777 at *10.

Assault weapons and LCMs are not only unnecessary for personal self-defense, they may be counterproductive. Assault weapons are inherently dangerous in "a home defense scenario" because they "pose a serious risk of over-penetration in most home construction materials." 7th Cir. Doc. 15 at A598-599. Firing an assault weapon in close quarters poses "substantial risks to individuals in adjoining rooms, neighboring apartments or other attached dwelling units." *Id.* at A599. LCMs likewise are poorly suited for self-defense as compared to smaller magazines because "the physical size/profile of the shorter magazine is easier to carry, shoot and conceal." Doc. 57-5 ¶ 23. This is why the most "respected," "popular," and

"effective self-defense firearms," like the "Model 1911" and "Sig P938," are handguns built to function with magazines that hold 15 or fewer rounds. *Ibid.* Indeed, it is "widely accepted" that such firearms, which remain legal in Illinois, are preferable for self-defense. Doc. 57-5 ¶ 21; see also Doc. 57-4 ¶ 61; Doc. 57-7 ¶ 25.

2. Second, it is not indisputable that assault weapons and LCMs are in common use for self-defense.[7] According to applicants, they satisfy the "common use" requirement because "there are approximately 24.4 million 'assault weapons' in circulation in American society." Appl. 9. But as the Seventh Circuit explained, the "common use" inquiry cannot be based "on numbers alone," or it would lead to "anomalous consequences," as "seen in the case of the AR-15." Appx. 165-166. In 1994, the federal assault weapons ban "made civilian possession of AR-15s (among other assault weapons) unlawful," and "few civilians owned AR-15s." Appx. 166. But after the legislation expired, "these weapons began to occupy a more significant share of the market." *Ibid.*; see also Doc. 57-5 ¶ 31 (only 12% of "modern sporting rifles" entered circulation between 1990 and 2004, as compared with 88% between 2004 and 2020). If common use were tied solely to numbers, "the federal ban would have been constitutional before 2004, but unconstitutional thereafter." Appx. 166.

Beyond producing this "anomalous" result, *ibid.*, applicants' preferred

---

[7] The Seventh Circuit explained that there "is no consensus on whether the common-use issue belongs at *Bruen* step one or *Bruen* step two," and "assume[d] (without deciding the question) that this is more properly a step two inquiry." Appx. 164. Respondents maintain that this is a step-one inquiry, *Bruen*, 142 S. Ct. at 2134, but because they presented evidence sufficient to satisfy the standard, *e.g.*, Docs. 57-4, 57-5, 57-6, 57-9, agree with the Seventh Circuit's ultimate conclusion that they would prevail regardless of where common use is assessed, Appx. 164.

standard is unworkable. Under it, the government would need to carefully monitor the introduction of new weapons so that it could regulate them before they became commonly sold and possessed, even if there was not yet evidence that they posed a public-safety threat. Otherwise, the government would risk being left powerless to regulate these weapons once they began to circulate more broadly, no matter how destructive and unnecessary for self-defense they turned out to be.

But even if the common use standard relied solely on numbers, the record does not show that applicants are indisputably entitled to relief. They fail to address LCMs and rely exclusively on the claim that there are approximately 24.4 million assault weapons in circulation. Appl. 9. However, they misattribute this number to Louis Klarevas, an expert for the State in one of the consolidated cases. *Ibid.* Klarevas made clear that "24.4 million" is a third-party estimate and "likely to be an over-estimate." Appx. 268. Moreover, he did not endorse the estimate, but only assumed it accurate for the sake of his analysis. Appx. 255 n.8. And, in fact, the estimate comes from an unpublished, non-peer-reviewed paper recounting an online survey that does not disclose its funding or measurement tools, see William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* (May 13, 2022)), and is contradicted by industry and government data showing that only 6.4 million gun owners (less than 8% of the 81 million gun owners in this country and 2% of all Americans) possess assault weapons, Doc. 57-7 ¶ 27. But even if accurate, 24.4 million assault weapons would be just 5% of the 461.9 million firearms in circulation. *Ibid.* This is a far cry from the 50% to 60% of

Americans that owned firearms—usually muskets and fowling pieces—at the Founding, Doc. 57-8 ¶ 15, or the 50% of modern gun owners who possess handguns, Doc. 57-7 ¶ 28.

3. Finally, it is not indisputably clear that applicants will satisfy their step-one burden as to the Act's LCM restrictions because LCMs are accessories and are unnecessary to operate firearms. The term "arms" referred to weapons and excluded related accessories like ammunition containers, which were referred to as "accoutrements." *Heller*, 554 U.S. at 581 (citing 1773 edition of dictionary defining "arms" as "[w]eapons of offence, or armour of defence"); *Ocean State Tactical*, 646 F. Supp. 3d at 387-388 ("[t]he word 'Arms' was a general term for weapons such as swords, knives, rifles, and pistols, but it did not include ammunition, ammunition containers, flints, scabbards, holsters, or 'parts' of the weapons such as the trigger, or a cartridge box"). Indeed, there is ample historical evidence demonstrating that during the Founding and Reconstruction eras, cartridge cases and boxes were not viewed as "arms." 7th Cir. Doc. 15 at A529-530; see also *id.* at A531-536 (collecting historical examples of cartridge boxes being considered "accoutrements"). LCMs similarly "are containers which hold ammunition." 7th Cir. Doc. 15 at A492; 7th Cir. Doc. 15 at A496 ("Because a [LCM] is not a required component for a firearm to operate, it is characterized as an accessory by the industry."). Thus, LCMs are not "arms" within the meaning of the Second Amendment.

In short, to satisfy *Bruen*'s first step, applicants had to demonstrate that it is indisputably clear that assault weapons and LCMs are "arms" within the Second

Amendment's plain text. Given the substantial evidence showing that assault weapons and LCMs are offensive, militaristic weapons not suitable for self-defense, applicants cannot meet this burden and certainly have not done so here.

B. It is not indisputably clear that the Act and ordinance are inconsistent with the Nation's history of regulating firearms.

Even if applicants had satisfied *Bruen*'s first step, their application should be denied because they did not show that it is indisputably clear that respondents will be unable to satisfy their burden at the second step. As with the first step, applicants make no meaningful attempt to meet the history-and-tradition test. In fact, their application includes no discussion of this country's historical tradition. Appl. 9-11. But regardless of that failure, it is not indisputably clear that applicants will succeed on the merits of their claim because, as the Seventh Circuit held, the Act and the ordinance are relevantly similar to the historical regulation of the dangerous and unusual weapons of the time, such as "firearms, explosives, [and] Bowie knives," Appx. 167, and of military-grade weaponry, Appx. 170.

1. As *Bruen* explained, the Second Amendment permits regulation of arms when the government shows that the regulation is "consistent with the Nation's historical tradition" by demonstrating that it is analogous to historical regulations. 142 S. Ct. at 2130. To determine whether regulations are appropriate analogues, courts must assess "whether the two regulations are relevantly similar." *Id.* at 2132 (cleaned up). *Bruen* did not "provide an exhaustive survey of the features that render regulations relevantly similar" but noted that "*Heller* and *McDonald* point toward" two "central considerations": "whether modern and

historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* at 2133 (cleaned up). And when a modern-day regulation implicates "unprecedented societal concerns or dramatic technological changes," courts should apply a "more nuanced approach" to reasoning by analogy. *Id.* at 2132.

2. *Bruen* also reiterated that our country has a longstanding tradition of regulating "dangerous and unusual" weapons. *Id.* at 2128; see also *Heller*, 554 U.S. at 627. As the Seventh Circuit recognized, Appx. 167, these regulations have limited the sale, possession, and use of such weapons since the Colonial era—pistols and "fighting knives" in the 18th and 19th centuries, revolvers in the second half of the 19th century, and machineguns and semiautomatic weapons in the early 20th century. In each era, legislatures imposed restrictions on categories of weapons when their proliferation caused escalating or novel forms of violence.

In particular, respondents' evidence showed that the origins of this tradition pre-date the Founding era. *E.g.*, 4 William Blackstone, *Commentaries on the Laws of England*, 148-149 (1769) ("riding or going armed with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land"). For instance, a 1686 East New Jersey law restricted concealed carrying of "any pocket pistol, skeines, stilettoes, daggers or dirks, or other unusual or unlawful weapons," 1686 N.J. 289, 289-290, ch. 9; see Doc. 57-10 ¶ 81, and other colonies regulated weapons like trap guns, clubs, and knives that posed a danger to the

public, *e.g.*, Doc. 57-10 ¶¶ 9, 81-85; see also*, e.g.*, 1750 Mass. Acts 544, ch. 17, § 1 (cited at Doc. 57-10, Ex. E); 1642 N.Y. Laws 33 (outlawing the drawing of knives).

During the Early Republic and Founding eras, legislatures continued to impose restrictions on specific "objectional" and "vicious" weapons like clubs, which had increasingly been used by criminals and as fighting instruments. Doc. 57-10 ¶¶ 72, 75, 76, 79 (cleaned up). By the end of the 19th century, "every state in the nation had laws restricting one or more types of clubs." Doc. 57-10 ¶73; *id.* Ex. C (compiling laws). As new dangerous and unusual weapons emerged during the 19th century, States continued to restrict them. One such weapon was the Bowie knife, which gained notoriety in the 1830s as effective for fighting, "especially at a time when single-shot pistols were often unreliable and inaccurate." *Id.* ¶ 63. When homicide rates increased, in part due to knife-dueling, so did laws restricting the use, sale, and possession of Bowie knives. Doc. 57-8 ¶ 24; Doc. 57-10 ¶¶ 63, 69. By the 20th century, most States restricted Bowie knives. Doc. 57-10, Ex. C.

The regulation of Bowie knives parallels the response to other emergent weapons. While 17th and 18th century pistols were not often used for committing crimes, advancements in technology during the 19th century made them more effective for criminal purposes, prompting States to prohibit carrying pistols, revolvers, and other concealable weapons. *E.g.*, Doc. 57-8 ¶¶ 16-17, 25-28; Doc. 57-10 ¶ 81. By the turn of the century, nearly all States prohibited or severely restricted the carrying of concealable firearms and other weapons*,* Doc. 57-8 ¶ 28, a practice that has since been deemed constitutional, *Bruen*, 142 S. Ct. at 2128.

The historical tradition of regulating firearms in response to technological advancements and criminal misuse continued into the 20th century. During World War I, advancements in weapons technology led to the invention of hand-held semiautomatic and automatic weapons. Doc. 57-10 ¶¶ 14-15. These new weapons proliferated, and "their uniquely destructive capabilities" began to impact civilian life through criminal violence. *Id.* ¶ 15. As in prior eras, States responded, with the majority enacting anti-machinegun laws between 1925 and 1934. *Id.* ¶ 22. Seven of these laws banned both automatic and semiautomatic weapons. *Id.* ¶ 27 & Ex. B. States also regulated removable magazines and magazine capacity: between 1917 and 1934, "at least twenty-three states enacted . . . restrictions based on the regulation of ammunition magazines or similar feeding devices, and/or round capacity." *Id.* ¶ 31. In 1932, Congress took similar action by banning machineguns, which it defined as "any firearm which shoots automatically or semiautomatically more than twelve shots without reloading," in the District of Columbia. *Id.* ¶ 23. Two years later, Congress enacted the National Firearms Act, which imposed a tax on the manufacture, sale, and transfer of machineguns and other firearms associated with criminal violence, like short-barreled shotguns and rifles. *Id.* ¶ 24. That statute was upheld over challenges to the restrictions on short-barreled shotguns in *United States v. Miller*, 307 U.S. 174, 178 (1939), and its restrictions on automatic firearms were recognized as permissible in *Heller*, 554 U.S. at 624, 627.

3. It is not indisputably clear that the Act and ordinance are inconsistent with this regulatory history. On the contrary, as the Seventh Circuit concluded, the

Act and ordinance fit comfortably within it. Appx. 167-169. Addressing *Bruen*'s "how" question, the court explained that the laws are analogous to historical regulations in that they impose a comparable burden on the individual right to self-defense. Appx. 167-168. As explained, *supra* pp. 18-21, assault weapons and LCMs are best suited for offensive combat: their defining characteristics are unnecessary (and often counterproductive) for lawful self-defense, with the result that handguns and shotguns are preferred for self-defense scenarios, while assault weapons are very rarely used this way. And because the Act and ordinance preserve access to a vast array of handguns, rifles, and shotguns, they are consistent with their historical predecessors in that they impose tailored restrictions on the instruments causing harm to the public while retaining the ability for Americans to own and carry firearms for self-defense.

The Seventh Circuit likewise hewed to *Bruen* when concluding that the public-safety justifications underlying the Act and the ordinance ("the 'why' question") are consistent with those that prompted historical legislatures to regulate categories of weapons to protect the health, safety, and welfare of the community. Appx. 168-169 (describing "unbroken tradition" since the Founding of "regulating weapons to advance similar purposes" as the Act and ordinance). This is especially so under the "'more nuanced approach'" to analogical reasoning, which is called for where, as here, restrictions implicate "'dramatic technological changes'" or "'unprecedented societal concerns.'" Appx. 151 (quoting *Bruen*, 142 S. Ct. at 2132). The Act and ordinance regulate items that did not exist during the Founding

or Reconstruction eras and that were made possible only by advancements in weapons technology in the mid-20th century. Doc. 57-6 ¶¶ 28-29, 32; Doc. 57-8 ¶¶ 15, 54; Doc. 57-10 ¶¶ 35-38, 43-45. And the phenomenal lethality associated with these technological advancements has allowed single shooters armed with assault weapons and LCMs to kill many people at once. Doc. 57-4 ¶ 40; Doc. 57-7 ¶ 15; Doc. 57-8 ¶ 6. The increasing frequency and severity of these shootings demonstrates that this is an unprecedented societal concern. Doc. 57-7 ¶¶ 18-21.

Finally, the Seventh Circuit noted that "the distinction between military and civilian weaponry" is "useful for *Bruen*'s second step, too." Appx. 170. The court explained that the Act and ordinance are consistent with this nation's tradition of regulating firearms for the additional reason that "[b]oth the states and the federal government have long contemplated that the military and law enforcement may have access to especially dangerous weapons, and that civilian ownership of those weapons may be restricted." *Ibid.*; see also Appx. 171-173 (collecting examples). Because, as explained, *supra* pp. 18-21, the record developed for purposes of the preliminary injunction proceedings showed that assault weapons and LCMs are "much more like machineguns and military-grade weaponry than they are like the many different types of firearms that are used for individual self-defense," Appx. 159, applicants cannot show that it is indisputably clear that the challenged restrictions are inconsistent with that historical tradition.

C. Applicants' contrary arguments are not persuasive.

Rather than explain why they satisfy the standard for issuing injunctions pending further review, applicants focus on identifying flaws in the Seventh Circuit's decision. Appl. 12-27. But as explained, that is insufficient to support applicants' requested relief because this Court is not a court of error correction. See Sup. Ct. R. 10. In any event, each of the alleged errors applicants identify rests on a misdescription of this Court's precedents or the Seventh Circuit's decision.

1. Applicants initially argue that the Seventh Circuit's decision conflicts with *Heller* in two respects, but they are incorrect. The first purported conflict is based on a misreading of *Heller*, which applicants argue resolves this case with respect to the semiautomatic handguns restricted by the Act and ordinance. Appl. 12. But *Heller* did not say anything about semiautomatic handguns in particular; instead, it concluded that a law banning *all* handguns was impermissible because it left individuals without an adequate means of self-defense in the home. 554 U.S. at 628-629; see also *Nat'l Ass'n for Gun Rights*, 2023 WL 4975979, at *34 (*Heller* "didn't foreclose any kind of restriction on the types of firearms that can be possessed and carried . . . [but] only a ban on firearms that are so pervasively used for self-defense that to ban them would infringe, or destroy, the right to self defense") (quotation marks omitted). That holding is not implicated here because, as explained, *supra* pp. 20-21, the Act and ordinance leave ample means for self-defense. In fact, many semiautomatic handguns are unaffected by the challenged restrictions. *E.g.*, Doc. 57-5 ¶ 23 (describing "widely popular" semiautomatic

handguns designed to function with magazines that hold seven or eight rounds and are "among the most effective concealed carry/self-defense firearms on the market").

The second purported conflict is based on applicants' view that under *Heller*, all firearms constitute "arms" within the meaning of the Second Amendment's plain text. Appl. 13. But as explained, *supra* p. 17, *Heller* reached no such holding; on the contrary, it recognized that the Second Amendment right "is not unlimited," 554 U.S. at 626, and "extends only to certain types of weapons," *id.* at 623. Nor did the Seventh Circuit ignore *Heller*'s discussion of "arms," as applicants contend. Appl. 13. Indeed, its discussion of Second Amendment principles begins with "a close look" at *Heller*'s interpretation of the term "Arms." Appx. 153-154.

2. Applicants next make a series of assertions based on a misdescription of the Seventh Circuit's analysis. For example, applicants accuse that court of ignoring the common use test because of its view that the test is circular. Appl. 14-15. But that is not true. As explained, *supra* pp. 21-22, the court remarked only that relying "on numbers alone" to determine common use would lead to "anomalous consequences." Appx. 165-166. It then proceeded to apply the common use standard in its discussion of history and tradition. Appx. 166.

Applicants make a similar mistake in contending that the Seventh Circuit rejected *Bruen*'s "how and why" metrics to determine whether a regulation is relevantly similar for purposes of reasoning by analogy. Appl. 15. But the court applied *Bruen*'s two-part test and, specifically, assessed "(1) how, and (2) why, . . . a given regulation burden[s] a law-abiding citizen's right to armed self-defense."

Appx. 167 (cleaned up). There is likewise no merit to applicants' charge that the Seventh Circuit engaged in "stealth interest balancing." Appl. 20. In fact, the court went to great lengths to avoid considering any evidence that could be construed as part of "the discredited means/end analysis." Appx. 168; see also Appx. 169 (rejecting evidence that "comes too close to the means/end scrutiny that *Bruen* rejected").

As a final matter, applicants contend that the Seventh Circuit applied a "unique three-part test" from *Friedman*. Appl. 25. But as just discussed, the court applied *Bruen*'s two-part test, and not a three-part test. In particular, the court did not, as applicants argue, limit the definition of "arms" to those that "were common at the time of ratification." *Ibid.* (internal quotations omitted). In fact, the court made clear at the outset of its analysis that "the Arms protected by the Second Amendment are not limited to those that were in existence at the time of its ratification, 1791, or at the time the Fourteenth Amendment took effect, 1868." Appx. 151. Nor did the court consider whether the Act and ordinance have a "reasonable relationship to the preservation or efficiency of a well regulated militia" or leave "law-abiding citizens" with "adequate means of self-defense." Appl. 25 (internal quotations omitted).

3. Applicants also take issue with the way in which the Seventh Circuit conducted its *Bruen* analysis. But these arguments, too, rest on a series of misunderstandings of the court's opinion. First, applicants contend that the Seventh Circuit misapplied *Bruen*'s "how" and "why" analysis, including by failing

to "engage in a robust examination of the historical record to determine if there were any Founding-era regulations analogous to the State's arms ban." Appl. 16. But as explained, *supra* pp. 27-28, the court reviewed the "unbroken tradition" since the Founding of "regulating weapons to advance similar purposes" as the Act and ordinance. Appx. 168-169. Likewise, the court recognized and applied *Bruen*'s instructions to assess whether "'modern and historical regulations impose a comparable burden' on [the Second Amendment] right" and whether the regulations are "'comparably justified.'" Appx. 151 (quoting *Bruen*, 142 S. Ct. at 2133). To be sure, the court reached different conclusions on these points than the one advocated by applicants, but that does not mean that it did not conduct the requisite inquiries.

Second, applicants contend that the Seventh Circuit made a factual and legal error in determining that "AR-15s are similar to the M-16s that were once used in the military and therefore not protected by the Second Amendment." Appl. 21-22. This is incorrect. As a factual matter, as explained, *supra* pp. 18-21, the court rightly concluded that these two weapons are similar based on the current record. And the court made clear that additional evidence adduced as the litigation progresses could alter its conclusion on this point. Appx. 163. With respect to the purported legal error, the Seventh Circuit did not interpret *Heller* to mean that "all weapons used for military service are not protected." Appl. 22. Rather, as discussed, *supra* pp. 18-21, the court differentiated between weapons "that ordinary people would keep at home for purposes of self-defense" and those that "are exclusively or predominantly useful in military service, or weapons that are not

possessed for lawful purposes." Appx. 156. Those in the latter category—which does not include all weapons used in the military—may be reserved for military use. *Ibid.*

Third, applicants claim that the Seventh Circuit failed to apply *Bruen*'s analysis to the LCM restriction. Appl. 24. That, too, is wrong. The court specifically addressed LCMs in both steps of the analysis. At the first step, it concluded, for the same reasons as those identified for assault weapons, that LCMs are not arms protected by the Second Amendment because they "can lawfully be reserved for military use." Appx. 162. And at the second step, the court assessed whether both the "firearms and ammunition" restricted by the challenged laws were consistent with historical tradition. Appx. 167; see also Appx. 173.

4. Additionally, applicants assert that the Seventh Circuit misapprehended the "dangerous and unusual" standard. Appl. 18. In their view, "[a]n arm that is commonly possessed by law-abiding citizens for lawful purposes" cannot be considered "unusual" and therefore cannot be categorically restricted, Appl. 20. That, again, misdescribes the decision below. The Seventh Circuit acknowledged that "all guns are dangerous when used as intended," recognizing that merely being "dangerous" does not bring a firearm within the tradition of regulating dangerous and unusual weapons. Appx. 170 n.12. The court then distinguished assault weapons and LCMs from "guns that are commonly owned and used." *Ibid.* And, indeed, on this record, it is not indisputably clear that assault weapons and LCMs are owned by more than a small percentage of Americans.

Supra pp. 22-23. Moreover, the historical evidence demonstrated that weapons only came to be considered "dangerous and unusual"—thus requiring a regulatory response—after their widespread use created new societal problems. *Supra* pp. 25-27; see also *Or. Firearms Fed'n*, 2023 WL 4541027, at *46 ("Throughout this Nation's history, new technologies have led to the creation of particularly dangerous weapons," which "became tied with violence and criminality" as they "became more common"). The Act and the ordinance, which were enacted in response to the problem of assault weapons and LCMs being increasingly used in mass shootings, adheres to that historical tradition. *Supra* pp. 27-29.

5. Finally, applicants contend that the Seventh Circuit's decision conflicts with *Staples v. United States*, 511 U.S. 600 (1994), which they describe as holding "that the difference between semi-automatic weapons like the AR-15 and the automatic M-16 is legally significant." Appl. 23. But as the court noted, *Staples* is inapposite: it was not a Second Amendment case (and thus did not assess what kinds of weapons are "arms" covered by that Amendment). Appx. 157. Furthermore, this Court's recognition in *Staples* that AR-15s were considered "widely accepted as lawful possessions," 511 U.S. at 612, is not relevant to the Second Amendment question at hand. Instead, that statement merely reflects the fact that when "the Court handed down the *Staples* decision five months *before*

Congress enacted the Federal Assault Weapons Ban, . . . as a matter of federal law it was lawful to own an AR-15." Appx. 157 (emphasis in original).

III. No Critical Or Exigent Circumstances Exist That Would Warrant An Injunction Pending Further Review.

Finally, applicants have not shown that they face the "most critical and exigent circumstances" that would entitle them to an injunction from this Court. *Brown*, 533 U.S. at 1303 (cleaned up). Indeed, their conduct suggests otherwise: applicants waited nearly three weeks after the Seventh Circuit issued its decision to seek an injunction from that court. 7th Cir. Doc. 187.

1. To start, applicants have not shown why this Court's intervention is necessary to avoid irreparable harm. First, applicants note that the temporary loss of First Amendment freedoms may constitute irreparable harm, contending that this principle should extend to the Second Amendment. Appl. 25 (citing *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976)). But in recognizing that this Court has not applied this principle outside the First Amendment context, applicants confirm that their right to relief is not indisputably clear. Nor has this Court applied this presumption to grant applications for injunctions pending appeal claiming First Amendment violations. *E.g.*, *Lux*, 561 U.S. at 1307-1308; *Brown*, 533 U.S. at 1302.

Applicants also cite *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), and *Baird v. Bonta*, 81 F.4th 1036 (9th Cir. 2023), for the proposition that a probable violation of Second Amendment rights presumptively establishes irreparable harm. Appl. 25-26. But in *Ezell*, an ordinance required firing range training "as a prerequisite to lawful gun ownership, yet at the same time prohibit[ed] all firing

ranges in the city." 651 F.3d at 690 (cleaned up). Because the ordinance made it "impossible" to qualify for gun ownership, it burdened "the right to possess firearms for protection," and the Seventh Circuit thus presumed that "[i]nfringements of this right [could not] be compensated by damages." *Id.* at 698-699. Similarly, in *Baird*, the Ninth Circuit concluded that California's licensing regime "effectively establishes a statewide ban on open carry by law-abiding Californians," 81 F.4th at 1039, which threatened "'an individual's right to carry a handgun for self-defense outside the home,'" *id.* at 1042-1043 (quoting *Bruen*, 142 S. Ct. at 2122). By contrast, neither the Act nor the ordinance precludes anyone from possessing any number of handguns, shotguns, or other weapons for self-defense.

Applicants further allege that the gun store and its owner will suffer financial loss. Appl. 26. Applicants reproduce this argument verbatim from their first application, and it should again be rejected. As support, applicants rely on *Cavel International, Inc. v. Madigan*, 500 F.3d 544, 545 (7th Cir. 2007), but there, a horsemeat exporter challenged a statute that would have outlawed its entire business and made its failure "a virtual certainty." And the defendants were "state officials sued in their official capacities" from whom the exporter "could not obtain monetary relief." *Id.* at 546. Here, the gun store does not exclusively sell assault weapons and LCMs; it also sells firearms not covered by the laws and offers gunsmithing and firearms training services.[8] Not only has the store remained

[8] Law Weapons & Supply, Online Store, http://bit.ly/3ZTimoU (last visited Dec. 5, 2023); Law Weapons & Supply, Law Weapons In-House Gun-Smithing Service, https://bit.ly/3Fby3jk (last visited Dec. 5, 2023); Law Weapons & Supply, Law

operational, but its affidavit—which was signed in February 2023—gives no estimate of how long the business could survive. Appx. 185-186. Applicants also have not even attempted to explain why a damages award, should they obtain one, could not make the store's owner whole. Doc. 48 at 7 (seeking compensatory damages); *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.").

2. The balance of equities and public interest also favor denying the application. As discussed, applicants have not shown that their inability to purchase or sell assault weapons and LCMs will irreparably harm them. By contrast, it is settled that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012). Moreover, the Act and ordinance promote a compelling interest in protecting the public and saving lives. Doc. 57-6 ¶¶ 31-35 (assault weapons cause wounds that are more destructive than other firearms); Doc. 57-7 ¶ 37 (assault weapon and LCM bans resulted in 72% decrease in deaths from mass shootings); Doc. 57-9 ¶¶ 33-40 (assault weapons cause high mortality rate as compared to handguns); see also *N.Y. State Rifle & Pistol Ass'n. v. Cuomo*, 804 F.3d 242, 262 (2d Cir. 2015) (assault weapons "are disproportionately used in crime," including "mass shootings" and murders of law enforcement officers); *Ocean State Tactical*, 646 F. Supp. 3d at 394 (public interest in prohibiting LCMs "could not be more undeniably compelling"). All told, the

---

Weapons Training Courses, https://bit.ly/3ZBbtJ8 (last visited Dec. 5, 2023).

applicants have not shown, and cannot show, that they meet the heightened standard to obtain an injunction pending appeal.

CONCLUSION

For these reasons, the application should be denied.

Respectfully submitted,

CHRISTOPHER B. WILSON*
KATHLEEN A. STETSKO
DANIEL T. BURLEY
KAHIN GABRIEL TONG
PERKINS COIE LLP
110 N. Wacker, Ste. 3400
Chicago, Illinois 60606
(312) 324-8400
CWilson@perkinscoie.com

DOUGLAS N. LETTER
SHIRA LAUREN FELDMAN
BRADY CENTER TO PREVENT
GUN VIOLENCE
840 First Street NE, Suite 400
Washington, DC 20002
(202) 370-8100

Attorneys for the Naperville Parties

KWAME RAOUL
Illinois Attorney General
JANE ELINOR NOTZ*
Solicitor General
SARAH A. HUNGER
Deputy Solicitor General
JOHN R. MILLIGAN
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
Jane.Notz@ilag.gov

Attorneys for the State of Illinois

*Counsel of Record

DECEMBER 6, 2023